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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 49

JOSE SORIANO,
Petitioner,

v.

THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE PETITIONER

Part II—Statute of Limitations

Part II of Brief for the Petitioner [1] is devoted exclusively to the question as to whether the suit by petitioner in the Court of Claims is barred by the Statute of Limitations, so that the Court of Claims has no jurisdiction of this case.

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[1] Whenever there is reference to Part I herein, this means the Brief for the Petitioner filed August 27, 1956, and the Reply Brief for the Petitioner. References to Appendices are, as follows: A to E follow the Petition for Writ of Certiorari; F to CC follow Brief for the Petitioner; DD to II follow Reply Brief for the Petitioner (Part I).

OPINION BELOW

The opinion of the United States Court of Claims, Judges Littleton and Madden dissenting, in *Compania Maritima v. United States*, No. 50165, decided November 7, 1956, which is not yet reported (ten (10) copies thereof were deposited with the Clerk of this Court on November 8, 1956), is the law of that Court applicable to the subject case, to which Court this case would return upon a reversal by this Court of the decision of December 16, 1955 (R. 15). Part II of the Brief for the Petitioner is concerned only with the opinion in the *Maritima* case.

STATUTES INVOLVED

The Statute of Limitations applicable, 28 U. S. C. Sec. 2501, 62 Stat. 976, provides:

> "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.
>
> * * * * *
>
> "A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases."

The Trading with the Enemy Act of 1917, as amended, 40 Stat. 411, 50 App. U. S. C. Sec. 1, *et seq.* provides in part, as follows:

> **"§ 2. Definitions**
>
> The word 'enemy', as used herein, shall be deemed to mean, for the purposes of such trading and of this Act [sections 1-6 and 7-39 of this Appendix]—
>
> (a) Any individual, partnership, or other body of in-

dividuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * *

"The words 'United States', as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof.

"The words 'beginning of the war', as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

"The words 'end of the war', as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the 'end of the war' within the meaning of this Act [sections 1-6 and 7-39 of this Appendix].

* * * *

"§ 3. Acts prohibited

"It shall be unlawful—

"(a) For any person in the United States, except with the license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act [sections 1-6 and 7-39 of this Appendix], to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for

the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy; or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy.

* * * *

"(c) For any person (other than a person in the service of the United States Government or of the Government of any nation, except that of any enemy or ally of enemy nation, and other than such persons or classes of persons as may be exempted hereunder by the President or by such person as he may direct), to send, or take out of, or bring into, or attempt to send, or take out of, or bring into the United States, any letter or other writing or tangible form of communication, except in the regular course of the mail; and it shall be unlawful for any person to send, take, or transmit, or attempt to send, take, or transmit out of the United States, any letter or other writing, book, map, plan, or other paper, picture, or any telegram, cablegram, or wireless message, or other form of communication intended for or to be delivered, directly or indirectly, to an enemy or ally of enemy: . . .

* * * *

"§ 8. Contracts, mortgages, or pledges against or with enemy or ally of enemy; abrogation of contracts; suspension of limitations

* * * *

"The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or

other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation: *Provided, however,* That nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law . . .

* * * * *

"16. Offenses; punishment; forfeitures of property

"Whoever shall willfully violate any of the provisions of this Act [sections 1-6 and 7-39 of this Appendix] or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act [said sections] shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than 10 years, or both . . .

QUESTIONS PRESENTED

A. Was suit filed in the Court of Claims less than three years after the claim (or claims) of petitioner *accrued?*

B. If not, did the War against Japan in the Philippines, or War Legislation in the United States suspend, upon the effective occupation of the Philippines by Japan, the operation of the Statute of Limitations during the period of that occupancy, as against an American national, who at all times during the occupation was a citizen and resident of the Philippines, in a suit in the Court of Claims against the United States; or did the War Legislation—the Trading with the Enemy Act—merely create, upon the Japanese occupancy,

a new "legal disability" within the meaning of the saving clause of 28 U. S. C. 2501—the three-year period applicable to "legal disabilities"?

STATEMENT OF FACTS

For the purposes of these questions, it is being assumed by petitioner as having been admitted as facts by respondent or proven by petitioner (Part I—Brief and Reply Brief for the Petitioner) that, during the period January, 1942, to January, 1945, organized, recognized, authorized guerrilla officers of the United States armed forces requisitioned food and supplies from petitioner, required for their military operations, for which they gave receipts, promising that the United States Army would pay therefor upon the *promised* return of General Douglas MacArthur, at an indefinite future date, thus creating a debt of the United States for which the United States is liable.

This is the very question pending before this Court, upon which this Court granted Certiorari, found in Part I, Brief for the Petitioner, in the Brief for the United States and in the Reply Brief for the Petitioner. This question has to be answered in the affirmative for the purposes of this Part II of the Brief for the Petitioner, because of the decision in *Compania Maritima v. United States, supra.*

On October 4, 1944, (USAFFE Regulation No. 1-75), General MacArthur, as Supreme Commander (Commander-in-Chief), Southwest Pacific Area, of which USAFFE was a branch or division, established a Theatre Claims Service in the Philippines to settle claims against the United States Army for the destruction of property.

On October 20, 1944, United States armed forces landed on Leyte Island as the first step in the liberation of the Philippines Islands from the Japanese. That liberation occurred upon the surrender of Japan on September 2, 1945.

On April 7, 1945, General MacArthur, by directive, established an Army Claims Service to settle various private claims

against the United States Army. (App. Z, Pet. Br. p. 69b.)

The Army Claims Service, on July 17, 1945, questioned its authority to process and settle claims against the United States of civilian suppliers arising out of guerrilla activities, and on August 6, 1945, by endorsement on the Memorandum of July 17, 1945, General MacArthur established the following policies:

> "(a) . . . The United States Army will assume the responsibility for paying certain claims arising out of activities of guerrilla forces in the Philippines. That responsibility will be limited to claims *for the value of goods or services essential for carrying on operations against the enemy.*
>
> "(b) . . . No payments will be made on claims arising out of activities of other than *recognized guerrilla forces.*
>
> "(c) The effective date of such claims will be the same as those for the pay of the personnel of the guerrilla forces, i.e., the effective date of recognition, not the date upon which the decision to recognize is made.
>
> "(d) Such claims will be paid from the appropriation, '*Expenses,* Army of the Philippines'.
>
> "(e) Payment will be made only on claims where there was *a clear understanding* at the time the supplies and equipment or services were purchased or contracted for *that payment would eventually be made.* There must have been a clear intention on the part of the guerrilla commander and of the vendor or employee that *an obligation was being created.* It must be definitely shown that the provision of such supplies, equipment or services was not intended as a patriotic donation to the common cause against the enemy. It must also be definitely shown that the supplies, equipment or services were *essential for the operation of the guerrilla forces.*" (Pet. Br. App. AA, p. 77b.) (Italics supplied.)

Many such claims were thereafter filed; many were settled and paid; and many others were rejected. (Resp. Br. pp. 72-74.)

In February, 1948, the Army Claims Service advised Filipino claimants that *March 31, 1948,* would be the last day for the filing of such claims which had arisen prior to July 1, 1946.

Petitioner filed his claim before the Army Claims Service on *March 30, 1948.* It was summarily denied on *June 21, 1948.* (R. 3.)

The Department of the Army, by radio, directed the Army Claims Service to terminate its activities respecting claims as of June 30, 1949, which it did.

Petitioner filed a Petition in the United States Court of Claims on *April 26, 1951.* After an Answer and Reply, respondent filed a Motion for Judgment on the Pleadings, which was granted December 16, 1955, the Court holding that, there being no debt of the United States, it had no jurisdiction of this case. (Part I.)

Petitioner filed a Petition for Writ of Certiorari, which was granted April 30, 1956.

STATEMENT OF PROBLEM INVOLVED IN PART II

The question involved in Part I of the Brief for the Petitioner is assumed by petitioner to have been answered in the affirmative for the purposes of Part II thereof. The answer to the question involved in this Part II is, however, a condition precedent to a consideration of and answer to the question involved in Part I. Both questions are jurisdictional and interdependent.

In 1952, the United States Court of Claims held, in *Marcos v. United States,* 102 F. Supp. 547, and in 106 F. Supp. 172, (see also *Oerlikon Machine Tool Works Buehrle & Co. v. United States,* 102 F. Supp. 417) (a) that a claim based upon a requisition *accrued* on the date of requisition (not on the date on which demand for payment thereof was denied) but (b) that the War of Japan against the United States in the

Philippines, or War Legislation in the United States suspended, upon the effective occupation of the Philippines by Japan, the operation of the Statute of Limitations during the period of that occupancy, i.e., from at least the end of 1941 to September 2, 1945, so that a Filipino claimant whose cause of action accrued during the occupation had six years from September 2, 1945, within which to sue the United States in the Court of Claims.

In 1956 (November 7), the United States Court of Claims held, in *Compania Maritima v. United States, supra,* that neither War in the Philippines nor War Legislation in the United States suspended, upon the effective occupation of the Philippines by Japan, the operation of the six-year Statute of Limitations, but that War Legislation—the Trading with the Enemy Act—merely created, upon the Japanese occupation, a new "legal disability" within the meaning of the saving clause of 28 U. S. C. 2501—the three-year period applicable to "legal disabilities".

More than three years and *less than six years* elapsed between the date of the surrender of Japan, September 2, 1945, and the date on which petitioner filed suit in the United States Court of Claims, April 26, 1951.[2]

If it is found by this Court that, since the basis of the claim is a requisition and the express promise that the United States Army would pay therefor, at an indeterminate date, or the inherent obligation of the United States Army to pay for the requisitioned goods, still in the future, the claim *first* had to be *presented* to the United States Army and be *denied,* before the claim *could accrue,* then, and in that event, the claim accrued on *June 21, 1948,* and the Petition to the Court of

---

[2] If the decision of the United States Court of Claims in the *Maritima* case is correct as to Point A Part II, of this Brief, the date on which the claim accrued, and with respect to the suspension of the Statute of Limitations, Point B of Part II of this Brief, then the question involved in Part I of the Brief for the Petitioner is moot.

Claims (*April 26, 1951*) was filed well within three years of the date of the *accrual* of the claim.

There would then be no occasion to decide whether War or War Legislation suspended the operation of the Statute of Limitations, or was only a "legal disability".

So, too, if it is found by this Court that the claims accrued upon the date of each requisition, but that the Statute of Limitations was suspended by reason of the War or War Legislation, then since the Petition in the Court of Claims was filed *less* than *six* years thereafter, it is within the period of limitations of the statute.

SUMMARY OF ARGUMENT

POINT A

The claim accrued June 21, 1948; suit in the Court of Claims was timely filed.

Petitioner's suit in the Court of Claims is based upon an express promise that the United States Army would pay for food and supplies requisitioned from petitioner for military operations during the war against Japan in the Philippines, at an indefinite future date. It should be axiomatic that such a claim must *first* be presented to the Army for payment and payment thereof be denied, before the claim accrues and before petitioner may sue in the Court of Claims.

Decisions of this Court and decisions of the Court of Claims prior to its decisions in *Marcos v. United States, supra,* and in the *Maritima* case, *supra,* amply support this view.

The requisitions were made between January, 1942, and January, 1945. Claim for payment was made before the Army Claims Service, established by the United States Army to hear, determine and pay such claims, March 30, 1948. The claim was denied June 21, 1948. Suit was filed in the Court of Claims April 26, 1951, less than three years after the date on which the demand for payment was refused. Suit was, therefore, timely filed.

POINT B

The six-year Statute of Limitations applicable to suits in the Court of Claims was suspended as to all residents of the Philippines by the War against Japan.

I.

General Statement—War with Japan and the Trading with the Enemy Act

The United States was at war with Japan in the Philippines from December 7-8, 1941, to September 2, 1945, and from the end of 1941, to September 2, 1945, the Philippines were effectively occupied by Japan.

During this period, under recognized rules of public international law and decisions of this Court, all trade and communication between residents of the United States and the Philippines was prohibited, and *all courts of the United States were closed to inhabitants of the Philippines.*

Equally, *under the Trading with the Enemy Act* and General Ruling No. 11 of the Treasury Department, during that occupation, all residents of the Philippines were "enemies" of the United States, with whom all persons in the United States were forbidden to communicate or trade, under severe criminal penalties, and to whom *all courts in the United States were closed.*

Under *Marcos v. United States, supra,* petitioner, whose cause of action accrued[3] during the Japanese occupation, would have had six years after September 2, 1945, in which to sue the United States in the Court of Claims, which he did on April 26, 1951. Under the decision in *Compania Maritima v. United States, supra,* wherein the Court of Claims

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[3] The acceptance of the date of "accrual" of the claim by petitioner, for the purposes of the argument under Point B, as being the date of the requisition, is not an admission by petitioner that the date of "accrual" is not in fact June 21, 1948—Point A.

reversed the *Marcos* case, the petitioner would have had only three years in which to sue, which he did not do, so that the claim would be barred by the Statute of Limitations and the Court of Claims would have no jurisdiction.

II.

Statutes of Limitations are suspended where War or War Legislation closes the courts to a plaintiff; the Trading with the Enemy Act created no new "legal disability".

Statutes of Limitations with respect to contracts between inhabitants of the territory owned or effectively occupied by warring nations are suspended, where trade and communication is prohibited by War or War Legislation, and where the *courts* of each belligerent are *closed* to inhabitants of the territory of the other.

Decisions of this Court since the Revolutionary War have recognized and adopted this rule of public law without exception, applying it even t[illegible] suit of the United States.

The decision in the *Maritima* case, to the effect that the six-year Statute of Limitations is suspended only as to *citizens* of an enemy, but not as to all *inhabitants* of the enemy-occupied territory during World War II, to whom it applied the three-year saving clause relating to "legal disabilities", is in conflict with decisions of three United States Circuit Courts of Appeals.

The Trading with the Enemy Act, upon which the decision in the *Maritima* case is based, merely incorporated in its provisions the principles of the rule of public international law and common law, then in full acceptance, and imposed penalties for its violation; that which the public and common law naturally could not do.

III.

The three-year saving clause in the Statute of Limitations does not bar the petitioner's action—the six-year limiting clause is applicable.

The pertinent language of present section 2501 (28 U. S. C.) and of the former section 262 (28 U. S. C.) are almost identical as to the *limiting* clause, the six-year clause, and are in substance the same as to the *saving* clause, the three-year clause.

The six-year *limiting* clause gives *every plaintiff*, otherwise qualified to sue, six years from the date the claim accrued the right to sue the United States in the Court of Claims.

During this period of six years, the Court of Claims is *open* to persons enumerated in the *saving* clause. The Statute of Limitations is running against them, because they have the right to sue and the courts are open to them or their representatives, but time in addition to the six years may be given them within which to sue, after the named "legal disability" has ended. The *saving* clause has always been strictly construed and has been held to apply *only* to persons who fall within its provisions fully.

The Court of Claims must be *open* to *every* plaintiff for a period of six years, under the *limiting* clause, and may be open for a further three years, or more, to persons coming within the provisions of the saving clause.

IV.

The exception in favor of persons to whom war closes the courts is always read into the limiting clause of all Statutes of Limitations.

Decisions of this Court fully support the above assertion. Under the decisions of this Court, from the date petitioner's claim accrued, *he had six years during which the Court of Claims was open to him*, within which to sue the United States in that Court. Petitioner sued in that Court within that time, and his claim is not barred by the Statute of Limitations, so that the Court of Claims does have jurisdiction of this case.

ARGUMENT

POINT A

The claim accrued June 21, 1948; suit in the Court of Claims was timely filed.

Petitioner urges that it *should be* axiomatic that, where a claim against the United States has arisen by reason of a proper, legally authorized, requisition for military needs, in an emergency condition in time of war, and of an accompanying express promise that the United States Army would pay at a future date, or even in the absence of such a promise—but merely under the Fifth Amendment to the Constitution, the Hague Conventions, and the Rules of Land Warfare—a contract with the United States Army, payment to be made by the United States at an indefinite future date—the claim must *first* be *presented* to the Army and *denied before the claim accrues*, and before suit thereon *may be* brought in the United States Court of Claims.

Such was the holding of the United States Court of Claims in *Dino v. United States*, 119 C. Cls. 304 (1951), where it was held that suit based upon a requisition by the Army in World War II could not be brought in that Court, until a *claim* for payment had *first* been *presented* to the appropriate branch of the Government and *denied*.

It would seen entirely logical and a reasonable legal conclusion to reach that, where a suit against the United States in the United States Court of Claims is predicated upon an informal contract such as a requisition made under emergency conditions in time of war, and an Army Claims Service has been set up by the United States Army to hear and determine such claims, demand for payment of the Army, by filing a claim with the Army Claims Service, and its refusal to pay, by a denial, are conditions precedent to filing suit in the Court of Claims, as held in the *Dino* case. That decision seems entirely correct, but it has not been followed by the Court of

Claims. Yet, insofar as Petitioner knows, the *Dino* case has never been *specifically* overruled, although it was not followed in the *Marcos* case and in subsequent decisions.

In *United States v. Taylor*, 104 U. S. 216, claimant had a right to claim from the Secretary of the Treasury the surplus received upon a tax sale. He was required *first* to present his claim to the Secretary of the Treasury. Suit was brought more than six years after the claim *arose*. This fact was held to be no bar to the suit, as there was no time limit within which the claimant must submit his claim to the Secretary of the Treasury. Only upon that *demand and a refusal to pay* would the claim *accrue*.

So, here, there was no breach of the implied or express contract to pay for the requisitions upon which this suit is based, when the materials were requisitioned and delivered, but only when payment therefor was refused. The date of the return of General MacArthur with the Armed Forces of the United States was indefinite. The breach of contract therefor occurred when, upon the return of the Army, the Army Claims Service denied the merits of the claim and refused payment. The claim of this petitioner against the United States then first *accrued*.

In *United States of America ex rel. Louisville Cement Company v. Interstate Commerce Commission*, 246 U. S. 638, this Court had before it the question of determining whether the cause of action for damages *accrued* "when the goods were received, or delivered by the carrier, or when the freight charges were actually paid", and held that it "*accrued*" when the freight charges were paid.

In *United States v. Smith*, 105 U. S. 620, this Court noted the distinction between it and *United States v. Clark*, 96 U. S. 37, saying:

> "The reasons why this Court held that the Statute of Limitations which applies to actions in general in the Court of Claims, of six years, did not apply to Clark's

> action, have direct relation to the differences we have noticed between that case and this. The Court there said that until the accounting officers had refused to allow the claim in his accounts there was no occasion to establish it in the Court of Claims. *There being no denial of his right, the Statute did not run.*" (Italics supplied.)

In the *Smith* case, the litigant's right was authoritatively denied, when he was ordered by the Postmaster General to, and did, pay the money. The Statute of Limitations *then* began to run, and as six years had elapsed before suit was brought, the claim was barred.

The subject case is indeed *Clark's* case.

In the case of *McMahon v. United States*, 342 U. S. 25 (1951), involving the grant of a new right to sue the United States, the difference between the date that a claim "arises" and the date it "accrues" is apparent. In that case the Court said the suit was brought under the Suits in Admiralty Act of March 30, 1920, (46 USCA 745), and the Clarification Act of March 24, 1943, (50 USCA 1291), permitting suit to be brought against the United States for injuries received by members of the crew on American-owned or -operated vessels within two years "after cause of action *arises*". The Court there held that the cause of action *arose* on the date of injury.

The statute applicable in the subject case begins to run, not when the cause of action *arises*, but only from the date the cause of action *accrues*.

The principle for which petitioner contends is supported by decisions of the Court of Claims prior to that in the *Dino* case, which were not applied in *Marcos v. United States, supra, Oerlikon Machine Tool Works Buehrle & Co. v. United States, supra*, or in *Compania Maritima, supra*.

In *Scott v. United States*, 18 C. Cls. 1, plaintiff, a Quartermaster in the United States Army, filed suit July 7, 1879, under the provisions of R. S. 1059, for relief from liability for United States funds in his possession that were stolen on September 4, 1868, from a field safe in his Army quarters.

No liability for the loss was imputable to the plaintiff, who, on April 17, 1882, in a letter to the Third Auditor, Treasury Department, asked for relief under the Statute. On April 18, 1882, the Treasury Department advised him that the relief available could only be had by a decision of the Court of Claims, as provided in R: S. 1059 and R. S. 1062.

The United States, upon suit being brought in that Court, defended on the ground that the six-year Statute of Limitations having expired more than six years after the date on which the funds were stolen, the Court was without jurisdiction to hear the cause. This defense was overruled by the Court on the strength of *Clark's* case, 11 C. Cls. 698, *United States v. Clark, supra; Hobb's* case, 17 C. Cls. 189; and *United States v. Smith, supra,* which decisions—

> ". . . are to the effect that it (a claim by or against the United States) does not become a claim within the meaning of the law until there has been, on the part of the Government some authoritative demand for payment, or a refusal to allow the credit, and only from the time of such demand or refusal does the statute begin to run."

The Court of Claims, in that case, after quoting from the opinion of this Court in the *Smith* case, said that where—

> ". . . it sufficiently appears . . . that claimant's right was authoritatively denied when he was ordered by the Paymaster General to pay the money, and that then was the proper time to apply for the protection of the Court of Claims by asking its decree that he should be credited on his accounts with that sum . . ."

had this to say in the *Scott* case:

> "In this case it does not appear that there was any authoritative *demand for payment, nor a refusal to allow a credit* in accounts of the claimant, until April 4, 1882. The claimant's case, therefore, coming clearly within the rule laid down in the recent decision of the Supreme Court,

is not cut off by the statute of limitations." (Italics supplied.)

In *Dino v. United States, supra,* the Court of Claims held that, because Dino had not presented his claim to the appropriate Government authority and had not had it disallowed, the Court had no jurisdiction to hear the claim.

If Dino was required *first* to submit his claim to proper officials of the War Department, the petitioner in the case at bar was justified, indeed required, to submit, as was done, his claim to the Army Claims Service, legally set up under the authority of the War Department to consider and dispose of claims of the character involved.

That being the fact, the claim did not *accrue* until payment was refused; or at least, during pendency of the claim, the Statute of Limitations was suspended. Otherwise, the Government could readily, until 1953, have sat on a claim, let the statute run, and the claimant would then have been out of Court. (28 U. S. C. 1494, 67 Stat. 226.)

In fact, considering the thousands of claims filed, many claims could not possibly have been given careful consideration, if any, on the merits, by the Army Claims Service, prior to the closing up of its operations on June 30, 1949. (Resp. Br. pp. 73-74.)

Since the question in this case involves the rights and remedies of thousands of our valiant *American Nationals by conquest, cession and allegiance,* at a time when we needed them badly, in the defense of the United States, and since our United States Army got the benefit of their property, as the Histories published by the Department of the Army and the various appendices show, (Pet. Br. App. S, pp. 24b-52b), we believe that this Court should hold that the following cardinal principles control this case:

(1) The United States Army had every right and power to requisition petitioner's property in the all-out War against Japan. (Part I.)

(2) Petitioner had every right to just compensation therefor, upon an express and implied contract, guaranteed by the Fifth Amendment to the Constitution of the United States, as well as by the Hague Conventions and the Rules of Land Warfare. (Part I.)

(3) Petitioner must first have demanded payment of the United States Army, which he did, and have had payment refused, before the claim accrued, and before he could sue in the Court of Claims.

(4) The Army Claims Service was set up to receive such demands for payment and to determine the claims for payment on their merits.

(5) Petitioner was given an opportunity to demand payment, duly demanded payment of the United States Army before the Army Claims Service established for that purpose, within the time limit for presenting claims, and was refused payment on *June 21, 1948*. On that date the individual claims, which *arose* between January, 1942, and January, 1945, first *accrued, and he was then entitled, during six years from that date, June 21, 1948*, to sue in the Court of Claims, which he did, on April 26, 1951, less than three years thereafter.

The claim is then not barred by the Statute of Limitations, and the Court of Claims has jurisdiction of this case.

POINT B

The six-year Statute of Limitations applicable to suits in the Court of Claims was suspended as to all residents of the Philippines by the War against Japan.

I.

General Statement—War with Japan in the Philippines and the Trading with the Enemy Act

On December 8, 1941 (55 Stat. 795, Pet. Br. App. J, p. 7b), the United States declared that a state of war existed between this country and Japan.

The invasion and occupation of the Philippines by the Japanese began immediately thereafter. By December 24, 1941, the United States forces had already begun evacuating Manila, and on December 25 or 26, 1941, Manila was declared an open city. The Japanese forces occupied Manila on January 2, 1942, obtaining thereby effective control and occupation of the Philippine Islands except for the defenses at Bataan and Corregidor Island which still remained under the effective control of the United States. In April, Bataan surrendered; on May 7, 1942, Corregidor surrendered; and on June 9, 1942, all organized armed forces of the United States in the Philippines were formally surrendered to the Japanese.

It can thus be seen that, before the end of December, 1941, conditions in the Philippines had become so chaotic that the Philippines were "enemy occupied" within the meaning of the Trading with the Enemy Act. In this connection, it should be noted that the Court below, in *Compania Maritima v. United States, supra*, found that the Manila area was "enemy occupied" as of December 21, 1941.

On September 2, 1945, Japan surrendered, and on that date Japanese occupancy and control of the Philippine Islands ended.

Thus, from the end of 1941 to September 2, 1945, under recognized rules of public international law and decisions of this Court, discussed *infra*, trade and communication between persons in the United States and residents of the Philippines was unlawful.

On December 8, 1941, the provisions of Section 3(a) of the Trading with the Enemy Act [50 U. S. C. App. 3(a)] automatically came into full force and effect, and all persons in the United States were thereby legislatively prohibited from trading and communicating with an "enemy" of the United States. The word "enemy" was defined in Section 2 of such Act to include any individual, of any nationality, "resident within the territory (including that occupied by the military

and naval forces) of any nation with which the United States is at war".

By General License of December 13, 1941 (6 F. R. 6420), the President provided:

> "A general license is hereby granted licensing any transaction or act prohibited by section 3(a) of the Trading with the Enemy Act, as amended, provided, however, that such transaction or act is authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses or otherwise, pursuant to Executive Order No. 8389, as amended."

By Presidential Memorandum of February 12, 1942, (7 F. R. 1409), the President provided:

> "Memorandum to the Secretary of the Treasury: All power and authority conferred upon me by Sections 3(a) and 5(b) of the Trading with the Enemy Act, as amended, are hereby delegated to the Secretary of the Treasury."

Thereafter on March 18, 1942, the Secretary of the Treasury issued General Ruling No. 11 (7 F. R. 2168). Such General Ruling prohibited all transactions which directly or indirectly involved any trade or communication with an enemy national. The term "enemy national" was defined to include any individual within enemy territory. The term "enemy territory" was specifically defined to include "that portion of the Philippine Islands occupied by Japan". The term "to trade" was defined in accordance with the terms of the Act.[3a]

The words "to trade", as used herein, shall be deemed to mean:

3a. The provisions of General Ruling No. 11 were carefully coordinated with censorship regulations governing the ordinary course of mail. Communication Ruling No. 1 (7 F. R. 2172) issued pursuant to 50 U. S. C. App. Sec. 618 and Executive Order No. 8985 (6 F. R. 6625).

"(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

"(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

"(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

"(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

"(e) To have any form of business or commercial communication or intercourse with. Oct. 6, 1917, c. 106, § 2, 40 Stat. 411."

As the war subsequently progressed, General Ruling No. 11 was amended from time to time in order to withdraw from the definition "enemy territory" certain countries which had been completely liberated by our armed forces.[4]

On May 29, 1945, after the conclusion of hostilities in Europe, paragraph (4)(b) of General Ruling No. 11 was amended to read as follows (10 F. R. 6313):

"(b) The term 'enemy territory' shall mean the following:

"(i) The territory of Germany, Italy, Japan, Bulgaria, Hungary, and Rumania; and

"(ii) The territory controlled or occupied by the military, naval, or police forces or other authority of *Japan*. Such territory shall be deemed to be those portions of Burma, China, French Indo-China, Hong Kong, British Malaya, the Netherlands East Indies, the *Philippine Islands* and Thailand occupied by Japan, and any other territory controlled or occupied by Japan." (Italics supplied)

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[4] For example, Continental France (9 F. R. 13196), Continental Belgium (10 F. R. 1430), and Luxembourg (10 F. R. 3904).

General Ruling No. 11 remained in this form through September 2, 1945.

As to the territories occupied by the armed forces of Japan, CCH Federal Banking Law Reporter, Vol. 2, Paragraph 41544, page 21, 513, states:

> "Occupied Territories—Particular territory in this area ceased to be 'enemy territory' as the Japanese occupying forces actually withdrew, (see (4)(b)(ii) of General Ruling No. 11) but all parts of this area are deemed, at the latest, to have ceased being 'enemy territory' on September 2, 1945, the date of the formal surrender of Japan."

See also *Compania Maritima v. United States, supra,* where it was found that the Japanese occupation of the Manila area did not cease until September 2, 1945.

It is clear, therefore, that international law, common law and War Legislation prohibited trade and communication between persons in the United States and residents of the Philippines, and that the *courts of the United States were closed to all residents of the Philippines,* from not later than the close of 1941 until September 2, 1945.

Prior to November 7, 1956, the law in the United States Court of Claims (*Marcos v. United States, supra,*) was that the war in the Philippines had suspended the operation of the Statute of Limitations and that a litigant residing in that enemy territory during the period of the war and whose claim accrued during that period had six years after the date of termination of that war within which to bring suit in the United States Court of Claims. That same principle, in substance, had also been applied in *Oerlikon Machine Tool Works Buehrle & Co. v. United States, supra.*

Since the requisitions which are the basis of the present claim were made between January, 1942, and January, 1945, it is apparent that (unless this Court accepts petitioner's arguments made in Point A hereof as to the date of *accrual* of the claim), petitioner's cause of action accrued during the

Japanese occupation of the Philippines. However, the Statute of Limitations did not begin to run against him until September 2, 1945. Consequently, petitioner having filed his petition in the Court of Claims on April 26, 1951, it follows that petitioner filed a timely suit in that Court.

On November 7, 1956 in *Compania Maritima v. United States, supra,* the Court of Claims specifically reversed its prior decisions in the *Marcos* case, and held:

(1) That since trade and communication between the *citizens* of belligerents is illegal and the courts of one are closed to the *citizens* of the other only under international and common law, the War suspends the operation of the Statute of Limitations only as to *citizens* of the belligerent nations;

(2) That even though the courts in the United States were in fact closed to the claimant, a Filipino residing in the Philippines during the Japanese occupation, the operation of the Statute of Limitations was not suspended as to him, because the courts were not closed to him by international or common law, but only by reason of the Trading with the Enemy Act, which merely created a "legal disability".

(3) That being under only a "legal disability", the claimant had only three years after September 2, 1945, the date on which that "legal disability" ended, within which to sue in the Court of Claims, and not six years.

As the facts show, suit was brought in the Court of Claims *more than three years* and *less than six years* after September 2, 1945.

The decision in the *Maritima* case was immediately brought to the attention of this Court, because if it correctly states the law, then the question now pending in this Court and awaiting argument in the subject case is moot.

This Court, on November 10, 1956, granted the parties herein the opportunity to brief and argue the question decided in the *Maritima* case, which is the occasion for this Brief for the Petitioner, Part II—Statute of Limitations.

II.

Statutes of Limitations are suspended where War or War Legislation closes the courts to a plaintiff—the Trading with the Enemy Act created no new "legal disability".

Statutes of Limitations presume that the *courts are open* to the plaintiff and that it is therefore not unjust to bar his suit after the passage of a specified time period. The presumption is destroyed where War or War Legislation closes the courts to the plaintiff, because trade and communication with the plaintiff are prohibited. In such circumstances, the operation of Statutes of Limitations are suspended during the period while the *courts are closed.*

In the United States, this principle has its origin in the time of the American Revolution, became firmly established during and after the Civil War, and has been unanimously upheld by the courts since that time. The rule applies to all types of Statutes of Limitations, whether procedural, substantive or jurisdictional. The principal cases dealing with the foregoing matter are:

(1) American Revolution: *Hopkirk v. Bell,* 3 Cranch 454 (1806).

(2) Civil War: *Hanger v. Abbott,* 73 U. S. 532 (1867); *Braun v. Sauerwein,* 77 U. S. 218 (1869); *Brown v. Hiatts,* 82 U. S. 177 (1872); *United States v. Wiley,* 78 U. S. 508; *The Protector,* 76 U. S. 687 (1869), 79 U. S. 700 (1871); *Levy v. Stewart,* 78 U. S. 244 (1870).

(3) World War I: *Steaua Romana Societate v. Woodman,* 2 F. Supp. 303 (E. D. Penn. 1931).

(4) World War II: *Osbourne v. United States,* 164 F. 2d 767 (2d Cir. 1947); *Chuchuru v. Chutchurru,* 185 F. 2d 62 (10th Cir. 1950); *Salvoni v. Pilson,* 181 F. 2d, 615 (D. C. Cir. 1950).

The rule of suspension applies, whether the plaintiff (a resident of enemy or of enemy-occupied territory) is a citizen

of a belligerent nation, of a friendly country, or of the United States, or is any other person with whom trade and communication is prohibited. In all of these cases, the plaintiffs did not have access to our courts.

The distinction made in the majority opinion in *Compania Maritima* is without substance and unsupported. In fact, in the decisions relied upon in making the distinction [*University v. Finch*, 18 Wall. 106, and *Poccardi v. Ott*, 98 S. E. 69 (West Virginia)] it is clear that *trade and communication were not prohibited*, and this prohibition is the very basis for the rule. The dissent shows what results can be reached by such a distinction.

The Federal courts have, without exception, followed the general rule, without ever making the distinction made by the majority opinion of the Court of Claims in the *Maritima* case. In fact, that decision is in direct conflict with the above cited decisions of three Circuit Courts of Appeals, arising out of World War II.

In *Osbourne v. United States, supra*, suit was brought by an *American* citizen who had been a prisoner of war and *not an enemy* alien. The Court noted, page 769, that a Japanese citizen would have been able to sue and that it would be the heighth of unreasonableness to grant such redress to one of our former enemies and deny it to a citizen who, through no fault of his own, was a prisoner of that enemy.

In *Chuchuru v. Chutchurru, supra*, the plaintiff was a resident of France, a *friendly country*, during its occupation by Germany, with which country the United States was at war in World War II. The pertinent facts are exactly the same as those in the *Maritima* case and in the subject case.

In these two cases and in the subject case, the plaintiffs were *residents of enemy-occupied territory* and their status as *"enemies"* and the inaccessibility of our courts to them was by virtue of the Trading with the Enemy Act, as well as by reason of public international and common law.

The Court said, in the *Chuchuru* case, at page 66:

"During the time the plaintiff resided in enemy country, the courts in this country were not within her reach. They were effectively closed to her. She was as completely foreclosed from access to the courts in Colorado as though she were a citizen of Germany and residing there. For purposes of this case, the statutes of limitation of Colorado were suspended during the time plaintiff was in enemy country. *Salvoni v. Pilson*, 86 U. S. App., D. C. 227, 181 F. 2d 615. With that period deducted, the suit was filed within six years after the cause of action accrued. Therefore, it was not barred. *Salvoni v. Pilson, supra.*"

Salvoni v. Pilson, supra, involved suit by a person who was in Italy during World War II, who brought suit in New York as a creditor some five years after the termination of war. *The nationality of the plaintiff does not appear.*

The Court said:

Page 616: ". . . Since the Revolutionary War, however, American courts have tolled statutes of limitations because of war."

Page 618: "First, 'we are not to send treasury abroad for the direct supply of our enemies in their attempt to destroy us', and, second, 'War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects, or citizens, of all commercial intercourse and correspondence with citizens or *persons domiciled* in the enemy country'." (Italics supplied.)

The Trading with the Enemy Act of 1917, as amended, was noted by that Court as a specific prohibition against all intercourse and correspondence between persons in the United States and persons in enemy country. Yet, the six-year statute was applied.

All that need be said about the Trading with the Enemy

Act of 1917, of which the Court of Claims has made so much importance in the *Maritima* case, is that it merely *incorporated* into its provisions the rule of law recognized by public law and by our courts.

That rule is that, whether a statute on the subject exists or not *(Braun v. Sauerwein, supra)*, war between belligerents suspends the operation of any Statute of Limitations in regard to debts or other contracts between residents of the warring nations, whether on their own territory or on territory effectively occupied by either of the warring nations.

The rule of common and public law existed without the Trading with the Enemy Act. That Act merely implemented existing common and public international law. The rule of common and public law, which is general in terms and violations of which cannot be punished without specific implementing legislation, was spelled out by the Trading with the Enemy Act to guide the people resident in the United States in their conduct with residents of enemy territory during World Wars I and II. At the same time, it imposed severe penalties for violations of the Act, which would still have been violations of common and public international law, but without penalty.

Congress was fully aware of the fact that, under public and common law, intercourse of every sort is prohibited between inhabitants of territory occupied by warring nations during the period of the war, and that the courts of each are closed to the inhabitants of the other during the war, when it passed the Trading with the Enemy Act, as was noted by Judges Littleton and Madden, in their dissent in the *Maritima* case. (Opinion pp. 13-14.)

> "Furthermore, as we pointed out in the *Marcos* opinion, *supra*, Section 8(c) of the Trading with the Enemy Act, as amended, after providing that the running of the statute of limitations should be suspended in certain specified situations, also provides:

"* * * *Provided, however,* That nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law.'

"As noted in the *Marcos* opinion, Congress, in enacting that provision, had before it a legal memorandum listing the authorities holding that war suspends the operations of the statute of limitations. (S. Rept. 111, 65th Cong., 1st Sess., pp. 21, 22; S. Rept. 113, 65th Cong., 1st Sess., pp. 21, 22.)"

There is no suggestion in the legislative history of that Act that Congress had in mind changing in any way the existing rule of public and common law applicable to residents of enemy territory.

The Trading with the Enemy Act created no new "legal disability" respecting the right or ability to bring suit in our courts by persons residing in "enemy" territory, including the Philippines, which the War against Japan had not already created.

The general rule of public and common law and the relationship of it to the Trading with the Enemy Act is well expressed in *Steaua Romana Societate, etc., v. Woodman,* 2 F. Supp. 303 (D. C. E. D. Penn.)

In that case, the plaintiff was a resident of Rumania. That country was occupied by Germany, with which we were at war—World War I. We were not at war with Rumania.

The Court said, at page 314:

"Discarding, for the time being, consideration of the German interests involved, Rumania entered the war on August 27, 1916. On December 6, 1916, the *German forces occupied* Bucharest. Thereafter until November 30, 1918, on which day the King of Rumania returned to his capital, the country was practically entirely oc-

cupied by the military forces of Germany. *'Territory in the occupation of the enemy is dealt with on the footing of enemy territory being considered as part of the domain of the conqueror so long as he remained in possession of it. All persons domiciled within the occupied territory are consequently regarded as enemies.' Colombos, Law of Prize,* §44. *This rule was incorporated into our Trading with the Enemy Act,* October 6, 1917, 2(a), 50 USCA Appendix, §2(a). Under the strictest possible interpretation of the law, therefore, *the period of time while we were at war with Germany, during which Rumania was occupied by German forces would have to be deducted from the elapsed time."* (Italics supplied.)

III.

The three-year saving clause in the Statute of Limitations does not bar the petitioner's action—the six year limiting clause is applicable.

The Court of Claims, in the *Maritima* case, had first erroneously to conclude that the Statute of Limitations applicable to suits in its Court by Filipinos against the United States was not suspended by the War against Japan in the Philippines and that the Trading with the Enemy Act created a new "legal disability", in order to apply the three-year *saving* clause, rather than the six-year *limiting* clause of the Statute of Limitations (28 U. S. C. 2501). Its error, in applying the three-year clause, results from a complete misconcept of the history, purpose, and nature of the two provisions of section 2501.

(a) The Statute.

It is not necessary to decide whether the Statute applicable to this case is former 28 U. S. C. 262 or present 28 U. S. C. 2501. So far as is here material, both are identical in substance.

The first sentence of each statute is the *limiting* clause, which provides:

> "Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court . . . within six years after the claim first accrues." (28 U. S. C. 262.)
>
> "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed . . . within six years after such claim first accrues." (28 U. S. C. 2501.)

By this clause Congress not only protected the United States from claims asserted after the passage of six years, but Congress also provided that *every plaintiff* who was otherwise qualified should be entitled to a period of *six years* in which to present his claim in the Court of Claims.

The second sentence of former 28 U. S. C. 262 is the *saving* clause, which provides:

> "The claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court . . . within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred . . ."

This *saving* clause has been shortened in 28 U. S. C. 2501 to provide, as follows:

> "A petition on the claim of a person under *legal disability* or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases." (Italics supplied.)

Except in the case of married women—who are no longer under "legal disability"—the above 1948 amendment effected no change in the *saving* clause. Consequently, the discussion below will, for purposes of clarity, refer to the 28 U. S. C. 262 version of the *saving* clause.

There is nothing whatsoever in the statute itself or in the legislative history of Section 2501 which suggests that Congress intended thereby to enlarge or diminish the then existing *saving* clause of Section 262.

(b) Origin of the Saving Clause.

There is nothing obscure or unusual about the *saving* clause. As Congress was aware, this portion of the statute is originally derived from the seventh section of the famous English statute of James I (21 Jac. 1, c. 16) *McDonald v. Hovey*, 110 U. S. 619, 621 (1884). That statute "was adopted in most of the American colonies before the Revolution, and has since been the foundation of nearly all of the like legislation in this country." *Wood v. Carpenter*, 101 U. S. 135, 139 (1879); *Levy v. Stewart, supra; Hanger v. Abbott, supra.*

That statute, after providing different periods of limitation for various types of action, concluded as follows:

> "VII. Provided nevertheless, and be it further enacted, That if any person or persons that is or shall be entitled to any such action . . . be or shall be at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme covert, non compos mentis,* imprisoned or beyond the seas; that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done."

The *saving* clause in 28 U. S. C. 262, *supra*, differs from the English statute in only three respects. (1) It omits im-

prisoned persons and redefines persons under mental disability. (2) It gives to the persons enumerated only three additional years after the cessation of their disabilities, instead of the additional full statutory period (in this case six years) provided in the English statute. (3) It adds the words after the semicolon, thus putting into express form the English rule of construction.

(c) The Court of Claims Is Not Closed to the Persons Enumerated in the Saving Clause.

The second point to be noted about the *saving* clause in 28 U. S. C. 262 is that the courts are always *open* to all persons specified therein.

Infants may bring suit against the United States, *Moore v. United States*, 7 C. Cls. 356 (1871); *Sgambati v. United States*, 172 F. 2d 297 (CA 2 1949), cert. den. 337 U. S. 938 (1949); *Paschal v. United States*, 95 F. Supp. 293 (SDNY 1950), and so may insane persons, *Leonard v. United States*, 18 C. Cls. 382 (1883); *Johnson v. United States*, 87 F. 2d 940 (C. C. A. 8, 1937). They need only be represented by their next friend, guardian, committee or trustee. Present Rule 20(c) of the Court of Claims recognizes this by providing:

> "(c) *Infants or Incompetent Persons.* Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend or by a guardian *ad litem*."

The statutory words "persons beyond the seas" apply "only to American citizens who are out of this country." *Pacifico v. United States*, 80 C. Cls. 391, 393 (1934); *United States v.*

Greathouse, 166 U. S. 601 (1897); *Mosby v. United States*, 24 C. Cls. 1 (1888).

The Court of Claims is always *open* to such persons, because it is neither unlawful nor impossible for them, *for that reason*, to communicate with an attorney in the United States, or to file their petition by mail. Mere "absence from this country (is) no disqualification for the bringing of a suit and the prosecution thereof." *Pacifico v. United States, supra.*

As has already been noted, the statutory reference to *married women*, is archaic, and the Court of Claims is always *open* to them.

Finally, it should be noted that the *saving* clause does not in *itself* constitute a limitation upon the rights of the persons included. All of them may bring suit at any time notwithstanding its provisions. The law is well summarized in 34 Am. Jur., Limitation of Actions, §196:

> "§196. *Right of Person Under Disability to Bring Suit notwithstanding Saving Clause.* The courts are universally agreed that a provision in a statute of limitations which extends the time for bringing suit as to persons under a disability is a *saving* clause, of itself imposing no disability, and that a person under its protection may sue during the period of the disability as if the provision did not exist. This rule has been applied to persons laboring under disabilities due to insanity, infancy, coverture, and imprisonment." (Italics supplied) Accord: 109 A. L. R. 954-958 annotation.

(d) Purpose of the Saving Clause.

The third point which should be noted about the *saving* clause in 28 U. S. C. 262 is the reason why Congress felt it *necessary* to place such an *express* provision in the statute. The answer is this:

> "In the absence of any exception in their favor . . . a statute of limitations will be applied as against the rights

of infants, married women (although under common law disability of coverture), and insane persons." 34 Am. Jur., Limitation of Actions, §192; and see also §§197, 201, and 206.

Examples of recent cases applying this rule are *Sgambati v. United States, supra,* and *Paschal v. United States, supra.* As this Court succinctly stated in *Vance v. Vance,* 108 U. S. 514, 521 (1883):

> ". . . the Constitution of the United States, to which appeal is made in this case, gives to minors no special rights beyond others, and it was within the legislative competency of the State of Louisiana to make exceptions in their favor or not. The exemptions from the operation of statutes of limitation usually accorded to infants and married women do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon express language in those statutes giving them time after majority, or after cessation of coverture, to assert their rights."

It follows that since infants, lunatics, married women, and persons beyond the seas are always free to bring suit, and since in the absence of a *saving* clause the statute will run against them, Congress by the *saving* clause intended to benefit only such of these persons as had *already let six years elapse.*

In other words, Congress gave to the persons specified in the *saving* clause two rights: (1) they might sue within the six years provided by the *limiting* clause; or (2) they might have the additional time provided by the *saving* clause. A plaintiff who could bring himself within the *saving* clause could choose whichever alternative he desired, but Congress *never* intended the statute to bar his claim *before the passage of at least six years during which the Court was open to him.*

(e) The Saving Clause is Strictly Constructed.

The fourth point to be noted about the *saving* clause in 28 U. S. C. 262 is that it is to be strictly construed. It applies to no persons except those possessing the disabilities specifically described as to type and time. *De Arnaud v. United States*, 151 U. S. 483 (1894).

Consequently, where the cause of action accrues *prior to* the existence of the disability, the statute will run even against the four classes of persons enumerated. *De Arnaud v. United States, supra.* Moreover, even where a claim accrues *during* disability the period of the *saving* provision will begin to run as soon as the disability ceases, and will continue to run even though the disability subsequently reoccurs. *Savage v. United States*, 23 C. Cls. 255 (1888).

A fortiori the statute always runs against *unmentioned personal* disabilities, such as sickness, surprise or accident, *Kendall v. United States*, 107 U. S. 123, 125 (1882); ignorance, *Green v. United States*, 17 C. Cls. 174, 187-8 (1881), or the inability to truthfully take an oath, *Kendall v. United States, supra; Sierra v. United States*, 9 C. Cls. 224, 231-233 (1873).

The reason for this strict rule of construction is apparent. Congress, like most other legislative bodies, considered it desirable to preserve the rights of persons laboring under certan *personal common-law disabilities* at the time when their causes of action accrued. In such cases Congress gave to infants a maximum possible period of twenty-four years in which to sue, and gave to the other persons, if the disability continued, an indefinite maximum period at least up until death. The *saving* clause, however, discloses no evidence that Congress intended to confer such a generous period of time upon persons laboring under any other *personal* condition, except the ones expressly described. The words "no other disability than those enumerated shall prevent any claim from being barred" merely make this point clear.

To recapitulate, three cardinal principles should be borne in mind when considering the *saving* clause in 28 U. S. C.

262. (1) It includes only persons to whom the *Court is always open*. (2) It is *not a limiting* clause; it is a *saving* one, conferring *greater* rights upon the persons mentioned, than does the *limiting* clause, and without such a *saving clause* the statute would run against them. (3) Only the persons with the disabilities specifically described are to be included in the *saving* clause and thus given an additional three years, or more, in addition to the six years during which the Court was *open* to them.

(f) The Correct Construction of the Statute.

The correct construction of the statute is readily apparent. Unlike coverture, infancy, insanity and absence from the United States, the universally recognized exception in favor of persons to whom the courts are closed by war, does not rest upon a condition of the *person*, but upon a condition of the *court*. The statute is based on the presumption that the *court is open*, and that every plaintiff with a good cause of action will not unreasonably delay in bringing suit. But, where a superior power *closes the courts* to him, the basis of the presumption is destroyed, and he is *deprived* of a portion of the time which Congress intended him to have to sue.

The decisions of this Court, which are discussed in the following section of this brief, make it clear that Congress intended the statute to mean that every plaintiff is entitled to *six years during which the Court is open to him* to sue.

To effectuate this purpose, the exception in favor of persons to whom the Court is closed—such as persons resident in the territory of warring nations—must be read into the *limiting* clause, or *first* sentence of the statute. What is implied in the six-year *limiting* clause are the words *"during which the Court is open"*, and therefore the period during which the Court is *closed* is always deducted, when computing the six-year period specified in the *limiting* clause.

This implied exception—the closing of the Courts because of War or War Legislation—has absolutely no relationship

whatever to the express *saving* clause for the benefit of persons to whom the Court is always *open*.

The reason why this Court holds that the statute is suspended is that without such suspension, persons to whom the courts are closed are *deprived* of a portion of the time which Congress or the other legislative bodies intended them to have. For this same reason, they cannot be read into the *saving* clause, for such a construction *also deprives* them of a portion of the time which Congress intended them to have.

IV.

The exception in favor of persons to whom war closes the courts is always read into the limiting clause of all Statutes of Limitations.

(a) The Decisions of the United States Supreme Court.

In the leading case of *Hanger v. Abbott, supra*,[5] the cause of action accrued in October 1859, one and a half years prior to the time when the Civil War closed the Arkansas courts to the New Hampshire plantiff. Suit was brought in April 1865, five and a half years later. The Arkansas statute of limitations (apparently Rev. Stat. 1838, ch. 91, sec. 6), gave the plaintiff three years in which to bring suit, and also contained the following saving clause:

> "Sec. 13. If any person entitled to bring any action in the preceding seven sections mentioned, except in actions against sheriff for escapes, and actions of slander, shall, at the time the cause of action accrued, be either within the age of twenty-one years, or insane, or beyond the limits of this State, or a married women, such person shall be at liberty to bring such action within the time specified in this act, after such disability is removed."

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[5] "The *Hanger* case has been consistently followed in the federal courts." *Osbourne* v. *United States*, 164 F. 2d 767, 769 (CA 2 1947).

After holding that the courts were closed to the plaintiff between May 1861 and January 1865, the Supreme Court held that this period should be *subtracted from the total period which had elapsed between the accrual of the cause of action and the filing of the petition.* Since the *remainder was less* than the statutory three years, the Court held that the suit was not barred and that the plaintiff should recover judgment. Clearly the Court read the implied exception into the three year *limiting* clause of the statute and construed the statute to mean that every plaintiff should have three years during which the court was *open* to him in which to bring suit. Analyzing the problem, the Court stated (p. 542):

> "* * * the right to sue was suspended by the acts of the government, for which all citizens are responsible. *Unless the rule be so, then the citizens of a State may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close the courts, and to successfully resist the laws, until the bar of the statute becomes complete, which cannot for a moment be admitted.* Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period." (Italics supplied)

If, however, the Court had held that the exception should be read into the *saving* clause of the statute, it would have directed judgment for the *defendant*. The cause of action had accrued *prior to* the closing of the Arkansas courts, and more than three years had elapsed between accrual and suit. Consequently the limiting clause (Sec. 6) would have barred the action, and the plaintiff would not have been within the saving clause (Sec. 13).

The significance of the decision is that the recognized exception in favor of persons to whom the *court is closed* has

no relation whatever to a *saving* clause for the benefit of married women, minors, lunatics, and persons beyond the seas. This unique exception—War and War Legislation—to all statutes of limitations is read into the *limiting* clause of the statute, not into the *saving* clause.

The case which conclusively establishes the erroneousness of the *Maritima* construction of the statute of limitations is *United States v. Wiley, supra.* There the cause of action arose in 1860, and the United States brought suit in February 1869. The statute of limitations—like 28 U. S. C. 262 and 28 U. S. C. 2501—had been enacted by *Congress* (Act of April 10, 1806, ch. 21, §4; 2 Stat. 374) and was *a six year limiting statute with a three year saving clause.* It provided:

> "Sec. 4. *And be it further enacted,* that all suits on marshals' bonds * * * shall be commenced and prosecuted within six years after the right of action shall have accrued, and not afterwards; saving nevertheless the rights of infants, *feme coverts,* and persons *non compos mentis,* so that they sue within three years after their disabilities are removed." [6]

The parties stipulated that between May 1861 and May 1865 the defendant could not be served with process for the commencement of the action, and the Court noted judicially that this inability to effect service was caused by the war (p. 513). The Court continued (p. 513):

> "The question, therefore, is whether the time during which the war existed, and during which it was impossible to serve process for commencement of suit, is to be deducted from the time which elapsed between 1860 and February 15th, 1869."

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[6] This statute is now 28 U. S. C. 544.

First the Court held that the rule of suspension established by *Hanger v. Abbott*, (and *The Protector*) *supra*, applied also to claims asserted by the United States Government, because even though the Government always had the *right* to sue during the Civil War, nevertheless it did not have the *ability* to do so (pp. 513-514). The Court also held that the Act of June 11, 1864 (13 Stat. 123) had not changed or affected the rule of these two cases (pp. 514-515).

Then, speaking of the foundation for the rule, the Court stated (pp. 513-514):

> "* * * Statutes of limitations are indeed statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue. Such reasonable time is therefore defined and allowed. But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away. *In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have.* * * *" (Italics supplied)

Consequently, the Court held that the suit was not barred, because substacting the four closed years (1861-1865) from the nine years between the accrual of the cause of action in 1860 and the instigation of suit in 1869, left less than the statutory six-year period.

From the above quoted portion of the opinion it is clear that this Court has held that the implied exception in favor of persons to whom the courts are closed shall be read into the *first* portion, or *limiting* clause, of statutes of limitations.

Had this Court *not* held that the exception should be read into the *limiting* clause, but into the *saving* clause, it would have affirmed judgment for the *defendant* on one of two grounds. First, the Government would have been barred by the three year provision in the *saving* clause, since suit was

brought in 1869 (which was *more than three years after* the reopening of the courts in 1865). Secondly, the cause of action had arisen in 1860, a year *prior to* the time when the courts were closed in 1861.[7]

In *Brown v. Hiatts, supra*, the plaintiff was a Virginia mortgagee and the defendants were two Kansas mortgagors. The cause of action arose on May 29, 1861, a month after the Civil War began, and suit was not brought until February 27, 1867. The defendants pleaded the three-year Kansas statute of limitations (Laws Kan. 1859, c. 3, p. 84, §§ 19, 20) which also contained a full English-type saving clause (§ 26). The statute clearly barred the action, unless the rule os suspension of *Hanger v. Abbott* was applied.

The court below, which was the federal Circuit Court of Kansas, took note that the question of whether northern statutes were suspended for southern plaintiffs had never been determined by the United States Supreme Court. But after making a careful and thorough examination of the law (4 Fed. Cas. 384), the Circuit Court held that: (1) northern courts were closed to the plaintiff until April 2, 1866; and that (2) under the rule of *Hanger v. Abbott* the suit was timely because brought within three years of that date.

The defendant, among other things, argued that the Civil War did not commence until the President's Proclamation of August 16, 1861, and that, therefore, the statute of limitations began to run on May 29, 1861 when the cause of action arose and continued to run "notwithstanding the subsequent disability to sue". To this, the Circuit Court replied (p. 390):

> "* * * The views of a majority of the judges in the Prize Cases would perhaps authorize us to hold that the war existed before the August proclamation, and before

[7] The words "at the time the cause of action accrues", although not stated in the saving clause, are implied. *McDonald* v. *Hovey*, 110 U. S. 619 (1884).

the bond in suit matured. But we do not place our decision upon this ground, but upon the ground that even if the statute of limitations did begin to run, the effect of the act of July 13, 1861,[8] and of the proclamation of August 16, 1861,[8] was to suspend its operation. *Where a statute continues to run, notwithstanding a subsequent disability, it is in cases where it is not unlawful to bring suit, and, perhaps, in cases only where it is possible to sue, as in the case of an infant or married woman, by next friend. The rule does not apply to the disability occasioned by a state of war.* In Hanger v. Abbott, the plaintiff's debt accrued before the war, and yet the period covered by the war was deducted. So, also, in Jackson Ins. Co. v. Stewart, Semmes v. Insurance Co., and Wall v. Robson, before cited. And so, also, in The Protector, *supra*, the statute had begun to run before the war commenced, and yet, the period occupied by the war was not included in computing the time allowed to take an appeal. In this connection, it is proper to answer an argument strenuously insisted upon by the respondent's counsel, viz. that courts cannot add to the exceptions of the statutes. Ordinarily, it is undoubtedly true, that courts cannot put into the statutes of limitations exceptions which the legislature has not seen fit to adopt, or has omitted to put there. *It is a sufficient answer to this objection, to say that the laws of war, especially those enacted by congress, are the paramount law, and, by suspending the right of action, they suspend also the running of the statute.* This seems to be the view of the court in Hanger v. Abbott, 6 Wall. [73 U. S.] 532, 541, 542." (Italics supplied).

Upon appeal, this Court affirmed, stating (pp. 183-184):

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[8] The Civil War legislation prohibiting trade and communication with the South (12 Stat. 257 and 1262).

"We concur also with the Circuit Court in its ruling, that the statute of limitations of Kansas did not run against the right of action of the complainant during the continuance of the civil war. * * * The period, therefore, between the 27th of April, 1861, and the 2d of April, 1866, must be excluded in the computation of the time during which the statute has run against the right of action of the complainant on the bond and mortgage in suit, and being excluded the present suit is not barred."

Speaking of the grounds for its decision, the Supreme Court stated (pp. 184-185):

"It is unnecessary to go at length over the grounds upon which the court has repeatedly held that the statute of limitation of the several States did not run against the right of action of parties during the continuance of the civil war. It is sufficient to state that the war was accompanied by the general incidents of a war between independent nations; that the *inhabitants* of the Confederate States on the one hand, and of the loyal States on the other, became thereby reciprocally enemies to each other, and were liable to be so treated without reference to their individual dispositions or opinions; that during its continuance all commercial intercourse and correspondence between them were interdicted by principles of public law as well as by express enactments of Congress; that all contracts previously made between them were suspended; and that the courts of each belligerent were closed to the citizens of the other.

"Statutes of limitation, in fixing a period within which rights of action must be asserted, proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor. The principle of public law which closes the courts of a country to a public enemy during war, renders

compliance by him with such a statute impossible. As is well said in the recent case of Semmes v. Hartford Insurance Company, 'The law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other.' " (Italics Supplied.)

(b) Petitioner's Claim is Not Barred.

It is clear that the Statute of Limitations (either 28 U. S. C. 2501 or 28 U. S. C. 262) in no way bars any portion of the petitioner's claim. Congress intended and this Court by its decisions, considering the facts presented, can be said to have consistently held that the statute does not become a bar until after the passage of *a total of six years during which the Court of Claims was open to the petitioner.*

The provisions of the *saving* clause are entirely immaterial, since that clause, which originally concerned only four specified categories of persons to whom the Court of Claims is *always open,* was not changed by Congress in Section 2501.

There is nothing peculiar in the wording of 28 U. S. C. 262 or 28 U. S. C. 2501. These statutes, like nearly all Federal and State Statutes of Limitations in the United States, are derived from the same English statute (*supra,* p. 32). All such Statutes of Limitations have the same simple and basic provisions, in substance, and minor variations in language are entirely immaterial. *McDonald v. Hovey, supra.*

The only respect in which the Statute of Limitations applicable in the Court of Claims is different from *some* other Statutes of Limitations is that it is jurisdictional.

As the Court of Claims and this Court have decided on several occasions, (1) the respondent (i.e., the Government) cannot waive the statute, and (2) this Court, as well as the Court of Claims, may raise the Statute of Limitations, on its own motion, even if the Government does not raise it, when the facts show that this jurisdictional question is involved.

CONCLUSION—PART II—STATUTE OF LIMITATIONS

Petitioner's suit in the United States Court of Claims is not barred by the Statute of Limitations, so that the Court of Claims does have jurisdiction of this case.

Respectfully submitted,

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